FILED
JUN 6 1946
CHARLES ELMORE CROPLEY
CLERK

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No. 1201

In the Supreme Court of the United States

October Term, 1945

United States ex rel. Constantinos Karpathiou,
petitioner

v.

Andrew Jordan, District Director of Immigration and Naturalization, Chicago District

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

CITATIONS

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UNITED STATES EX REL. CONSTANTINOS KARPATHIOU,
PETITIONER

v.

ANDREW JORDAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, CHICAGO DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW

The opinion of the circuit court of appeals (R. 41–44)[1] is reported at 153 F. 2d 81~~9~~. 0

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[1] We have secured from the clerk of the circuit court of appeals and have lodged with the Clerk of this Court the respondent's return and exhibits attached thereto, in the earlier habeas corpus proceeding instituted by petitioner (see p. ~~4~~, *infra.*) The exhibits consist of the original records of the Department of Labor concerning the deportation proceeding against petitioner. These records were incorporated as part of the record on appeal in the instant case (R. 19). Pursuant to stipulation they were not printed, but were, however, considered by the circuit court of appeals (see R. 21, 38, 42). References to these records are designated by the original exhibit numbers.

JURISDICTION

The judgment of the circuit court of appeals was entered February 18, 1946 (R. 44). The petition for a writ of certiorari was filed May 3, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner instituted a habeas corpus proceeding challenging the validity of a warrant directing his deportation. The validity of the warrant was sustained. Several years later he filed a second petition for a writ of habeas corpus challenging the validity of the warrant. The district court, on motion of the respondent, dismissed the petition. The questions presented by the petition for a writ of certiorari are

1. Whether, in view of the prior proceeding, the district court properly dismissed the recent petition;

2. Whether, in any event, (a) there was sufficient evidence to support the warrant of deportation, and (b) whether petitioner was accorded a fair hearing in the deportation proceeding; and

3. Whether the warrant of deportation was void because it was issued by an assistant to the Secretary of Labor.

STATUTE INVOLVED

Section 19 of the Act of February 5, 1917, c. 29, 39 Stat. 877, 889 (8 U. S. C. 155), as it read at the time of the issuance of the warrant of deportation, provided:

> * * * any alien who shall be found an inmate of * * * a house of prostitution * * * after such alien shall have entered the United States, * * *; any alien who * * * is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, * * * the decision of the Secretary of Labor shall be final.

STATEMENT

Petitioner is an alien, a native and citizen of Greece, who entered the United States on September 23, 1907 (R. 9, 22). In October 1936, a deportation proceeding was instituted against him (Ex. 1), and after hearings in 1936 and November 1937, at which he was represented by counsel (Ex. 2), an assistant to the Secretary of Labor on January 14, 1938, on the basis of the proof submitted, issued a warrant directing his deporta-

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tion to Greece on the ground that he was subject to deportation under Section 19 of the Act of February 5, 1917 (*supra*, p. 3), in that he "is employed by, in, or in connection with a house of prostitution; and that he is an inmate of a house of prostitution" (Ex. 3). On July 16, 1938, petitioner filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois, claiming that the warrant of deportation was invalid in that it was not supported by competent evidence and that he had not been accorded a fair hearing by the immigration authorities (R. 7; see also pages 2–4 of the record in No. 740, October Term, 1939, certiorari denied, 309 U. S. 681). The district court dismissed the petition after a hearing, and on appeal to the Circuit Court of Appeals for the Seventh Circuit, the order of dismissal was affirmed (R. 7–11; 106 F. 2d 928). Petitioner's application for a writ of certiorari was denied by this Court for the reason that it was not filed within the time required by law. 309 U. S. 681; No. 740, O. T. 1939.

The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the Northern District of Illinois on May 25, 1945. Petitioner renewed his claims that the warrant of deportation was invalid in that it wa snot supported by competent evidence and that he had not been accorded a fair hearing by the immigration authorities (R. 2–4). Re-

spondent filed a motion to dismiss the petition, in which he set forth the proceedings on the earlier petition and alleged that the second petition did not raise any new issues (R. 7–8). After hearing argument of counsel, the district court dismissed the petition (R. 14), and on appeal to the Circuit Court of Appeals for the Seventh Circuit, the order of dismissal was affirmed (R. 41–44).

ARGUMENT

1. As appears from the Statement, p. 4, *supra,* each of petitioner's applications for a writ of habeas corpus assailed the validity of the warrant of deportation on identical grounds, viz., that the warrant was not supported by competent evidence and that he had not been accorded a fair hearing. These issues were determined adversely to petitioner in the first habeas corpus proceeding. (See R. 9–11.) Accordingly, we believe that the court below correctly held, on the basis of the decisions cited by it, that in the second proceeding the "district court properly exercised its sound discretion in giving controlling weight to the prior decision and in dismissing the petition" (R. 43–44). Petitioner's contention (Pet. 40) that the second habeas corpus petition raised an issue which was not involved in the earlier proceeding by virtue of the allegation in the second application that respondent "has no warrant whatsoever for the commitment or detention" of petitioner (R. 4), is hardly tenable. Since a warrant

of deportation was concededly outstanding, it is difficult to understand how this allegation raised any issue in the case. But even if it be assumed that by this allegation petitioner was attacking the validity of the warrant on the ground that it was signed by an assistant to the Secretary of Labor instead of the Secretary of Labor (see Pet. 40), it does not avail him. This fact was known to him in the first habeas corpus proceeding, and he failed to raise the point there. Under these circumstances, he should not be permitted to reserve the point for use in attempting to support a second petition for a writ of habeas corpus. As this Court said in an analogous situation, this would result in making "an abusive use of the writ of habeas corpus." *Wong Doo* v. *United States*, 265 U. S. 239, 241.

2. On the merits, petitioner's principal contention (Pet. 21, 23, 24–38) is that the warrant of deportation is void because it is not supported by competent evidence that the Willow Inn at which he was employed was a house of prostitution. He argues that the only evidence adduced at the deportation hearings to support the charge as to the nature of the inn was inadmissable hearsay, as against which the record contained the testimony of witnesses who appeared in petitioner's behalf and who had visited the inn, that to their knowledge the inn was not a house of prostitution. Assuming that petitioner is now entitled to a second judicial review

of this contention, despite the earlier adverse determination, we submit that it is without merit.

In discussing petitioner's contention on his appeal in the first habeas corpus proceeding, the court below said that the immigration authorities received in evidence at the hearings before them the affidavits of inmates or employees of the inn which petitioner did not deny supported the charges against him;[2] that petitioner was offered the opportunity to examine the affiants at the hearings, but that he waived the opportunity except as to one of them;[3] and that in these circumstances the affidavits were properly received in evidence (R. 9–10). The court also stated in this connection that apart from the affidavits "there was testimony at the hearing which tended very strongly to support the charge. One witness in particular, an immigration inspector, gave strong and convincing testimony in support of the charge. * * * it is sufficient to state it was positive and direct and in connection with other circumstances testified to at the hearing, was sufficient

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[2] The affidavits are in the form of exhibits attached to Ex. 2 in the first habeas corpus proceeding, viz., Ex. 2 (pp. 5, 7–8); Ex. 3 (pp. 4–5); Ex. 4 (pp. 3–4); Ex. 5 (pp. 1–3); Ex. 6 (pp. 2–6). They show that during the time of petitioner's employment at the inn, it was used, at least in part, as a house of prostitution.

[3] The record shows that petitioner's counsel cross-examined two of the affiants (Ex. 2, pp. 51, 71–72), that he was accorded the opportunity to cross-examine the others, and that he specifically waived the privilege as to the later (Ex. 2, p. 56).

to justify the conclusion reached * * *", ~~and,~~ Referring to the fact that petitioner's witnesses, 'including business men, local officials and acquaintances of [petitioner], many of whom at rather infrequent intervals ~~had~~ visited the house in question, ~~gave testimony to the effect~~ testified that they had not observed anything about the place of an immoral or improper nature,"[5] the court said that such "testimony, however, was negative in character and did not preclude the Secretary of Labor from determining the issue presented adversely to [petitioner] upon the direct and positive evidence before him"[4]

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[4] Apparently the opinion at this point had reference to the testimony of Inspector Goodall. He testified that he was at the inn on August 16, 1937, at which time he saw a woman solicit a man, presumably for sexual relations, and saw them go upstairs (Ex. 2, p. 106). This was after the deportation proceeding had been instituted (see p. 3, supra). Goodall also testified that the next morning he saw petitioner asleep in a room at the inn and had seen petitioner at the inn on several occasions in 1937 (Ex. 2, pp. 106–107). Petitioner testified that he had left his employment at the inn in December 1936 (Ex. 2, p. 81). One witness testified that five or six years previously he had been solicited by a girl at the inn, and that "they are supposed to have girls there" (R. 31–32; see Ex. 2, pp. 73–77). Another witness testified that he had heard there were prostitutes at the inn, and that he heard "some fellow ask the lady behind the bar where is Blondie, and she said upstairs" (R. 32; see Ex. 2, pp. 77–79). A fourth witness testified that he presumed that one of the waitresses at the inn was working as a prostitute, "on her past reputation" (R. 33; see Ex. 2, pp. 84–88). A fifth witness testified that some of the girls at the inn asked him and a friend "to go upstairs to bed with them" (R. 34; see Ex. 2, pp. 102–104).

[5] The testimony of these witnesses is narrated at pages 23–27, 29–30, and 32–34 of the record.

(R. 10–11). The court held that under the deportation statute the decision of the Secretary of Labor was final, and that the courts were without authority to weigh the evidence or to substitute their judgment as to the merits of the case (R. 11). In the present proceeding, the court below stated that upon examination of the record in the first case it was convinced that that case had been properly decided (R. 42).

It is, of course, clear that the decision of the administrative officer charged with the duty of issuing deportation orders is final. The statute (p. 3, *supra*) so provides. However, although no direct review of such a decision may be had in the courts, a collateral review by way of habeas corpus may be secured to the extent of determining whether the deportation proceeding so lacked the elements of a fair hearing that it can be said that the alien was deprived of due process of law. *Bridges* v. *Wixon,* 326 U. S. 135, 156, dissent, pp. 166–167; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 106; *Bilokumsky* v. *Tod,* 263, U. S. 149, 153. In such a collateral review, "the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (*Tisi* v. *Todd,* 264 U. S. 131, 133) or by showing that incompetent evidence was admitted and considered. *Vajtauer* v. *Commissioner, supra,* p. 106." *Bridges* v. *Wixon, supra,* at 156. And it is enough that there is "some evidence to support

[illegible] The [illegible] had [illegible]
[illegible] the [illegible] of the [illegible]
[illegible] the [illegible]

[illegible]

the deportation order." *Id.*, p. 149. ~~Tested by~~ In the light of these standards, the proceeding in petitioner's case was not violative of due process. The evidence summarized in footnotes 2 and 4, *supra*, p. 2-8, was sufficient to support the warrant of deportation. ~~Furthermore~~ Nor was the hearing ~~was not~~ rendered unfair by reason of the fact that affidavits were admitted. There was no violation of the applicable regulations in this respect. The Immigration Rules and Regulations of January 1, 1930, then in effect, did not proscribe the use of affidavits in a deportation proceeding (see Rule 19, Subdivision D). And, since petitioner had been accorded an opportunity to cross-examine the affiants (*supra*, p. 7), it was permissible to receive and to consider the affidavits in support of the charges. *Hays* v. *Zahariades*, 90 F. 2d 3 (C. C. A. 8), certiorari denied *sub nom. Zahariadis* v. *Hays*, 302 U. S. 734; *Ranieri* v. *Smith*, 49 F. 2d 537 (C. C. A. 7), certiorari denied, 284 U. S. 657; *Ghiggeri* v. *Nagle*, 19 F. 2d 875, 876 (C. C. A. 9); *In re Giacobbi*, 32 F. Supp. 508, 517 (N. D. N. Y.), affirmed, 111 F. 2d 297 (C. C. A. 2).[6]

3. Petitioner's final contention (Pet. 21, 23, 24, 40–41) that the deportation warrant is void be-

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[6] *Hanges* v. *Whitfield*, 209 Fed. 675 (N. D. Iowa), upon which petitioner relies (Pet. 23, 27–28), is not, as the court below stated in its first opinion (R. 10), "at variance with the general rule," for the reason that in that case the alien had been denied the right to examine the affiants at the hearing.

cause it was issued by an assistant to the Secretary of Labor instead of by the Secretary of Labor is plainly without merit. It has uniformly been held that ~~an~~ assistants to the Secretary of Labor ~~was~~ were authorized to issue deportation warrants. See *Restivo* v. *Clark,* 90 F. 2d 847, 850 (C. C. A. 1); *Werrman* v. *Perkins,* 79 F. 2d 467, 468–469 (C. C. A. 7); *United States ex rel. Petach* v. *Phelps,* 40 F. 2d 500, 501 (C. C. A. 2); *In re Giacobbo,* 32 F. Supp. 508, 515 (N. D. N. Y.), affirmed, 111 F. 2d 297 (C. C. A. 2); *United States ex rel. Constantino* v. *Karnuth,* 35 F. 2d 601 (W. D. N. Y.), affirmed, 31 F. 2d 1022 (C. C. A. 2), certiorari denied, 280 U. S. 570; *Hajdamacha* v. *Karnuth,* 23 F. 2d 956, 958 (W. D. N. Y.).[7]

CONCLUSION

The case was correctly decided below, and there is no question of importance or conflict of de-

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[7] The Act of March 4, 1927, c. 498, 44 Stat. 1415 (5 U. S. C. 613a), provides for two assistants to the Secretary of Labor who "shall perform such duties as may be prescribed by the Secretary of Labor or required by law." While petitioner asserts (Pet. 41) that there was a later amendatory provision authorizing the "Assistant Secretary" to issue warrants of deportation, he does not cite the amendment, and we have found no such amendment. It may be that petitioner is referring to 8 U. S. C. 458 (a) Act of June 28, 1940, c. 439, Title III, sec. 37, 54 Stat. 675), which authorizes the Attorney General, to whom the administration of the immigration laws has been transferred to exercise his authority under those laws through such officers of the Department of Justice as he ~~might~~ may designate.

cisions involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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June 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946